IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-6438

EWELL SCOTT, On Behalf of Himself And All Others Similarly Situated,

PETITIONERS,

vs.

KENTUCKY PAROLE BOARD, LUCILLE ROBUCK, Chairman of the Kentucky Parole Board, CHARLES WILLIAMSON, NEWT MC CRAVEY, CARL OWSLEY, and GLEN WADE, Members of the Kentucky Parole Board,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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* * * * * * *

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

The petitioner Ewell Scott, on behalf of himself and the class he represents, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on January 15, 1975, petition for rehearing denied and mandate entered on April 2, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported and is set out in the Appendix hereto on p 1A . The Memorandum Opinion of the District Court is unreported and is set out in the Appendix hereto on p. 3A.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on January 15, 1975, and a timely petition for rehearing and suggestion of the appropriateness of a rehearing in banc was denied on April 2, 1975. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the minimum guarantee of procedural due process safeguarded by the Fourteenth Amendment apply to state parole release proceedings?

2. If the Fourteenth Amendment's guarantee of procedural due process does apply to state parole release proceedings, what are the minimum procedures that must be employed by a state parole board in conducting such proceedings?

STATUTORY PROVISIONS INVOLVED

Ky. Rev. Stat. §439.330:

> (1) The board shall:
> (a) Study the case histories of persons eligible for parole, and deliberate on that record;
> (b) Conduct hearings on the desirability of granting parole;
> (c) Impose upon the parolee or conditional releasee such conditions as it sees fit:
> (d) Order the granting of parole;
> (e) Issue warrants for persons charged with violations of parole and conditional release and conduct hearings on such charges;
> (f) Determine the period of supervision for parolees and conditional releasees, which period may be subject to extension or reduction after recommendation of the division is received and considered;
> (g) Grant final discharge to parolees and conditional releasees.
>
> (2) The board shall adopt an official seal of which the courts shall take judicial notice.
>
> (3) The orders of the board shall not be reviewable except as to compliance with the terms of KRS 439.250 to 439.560.

(4) The board shall keep a record of its acts, shall notify each institution of its decisions relating to the persons who are or have been confined therein, and shall submit to the governor a report with statistical and other data of its work at the close of each fiscal year.

Ky. Rev. Stat. §439.340:

(1) The board may release on parole such persons confined in any adult state penal or correctional institution of Kentucky as are eligible for parole. All paroles shall issue upon order of the board duly adopted. As soon as practicable after his admission and at such intervals thereafter as it may determine, the Division of Institutions shall obtain all pertinent information regarding each prisoner, except those not eligible for parole. Such information shall include his criminal record, his conduct, employment and attitude in prison, and the reports of such physical and mental examinations as have been made. The Division of Probation and Parole shall furnish the circumstances of his offense and his previous social history to the institution and the board. The Division of Institutions shall prepare a report on such information as it obtains. It shall be the duty of the Division of Probation and Parole to supplement this report with such material as the board may request and submit such report to the board.

(2) Before granting the parole of any prisoner, the board shall consider the pertinent information regarding the prisoner and shall have him appear before it, or one or more members for interview and hearing. A parole shall be ordered only for the best interest of society and not as an award of clemency, and it shall not be considered a reduction of sentence or pardon. A prisoner shall be placed on parole only when arrangements have been made for his proper employment or for his maintenance and care, and when the board believes he is able and willing to fulfill the obligations of a law abiding citizen.

(3) The board shall adopt such rules or regulations as it may deem proper or necessary with respect to the eligibility of prisoners for parole, the conduct of parole hearings, or conditions to be imposed upon parolees. Regulations governing the eligibility of prisoners for parole shall be in accordance with prevailing ideas of correction and reform.

(4) Whenever an order for parole is issued it shall recite the conditions thereof.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Constit. amend XIV: "[N]or shall any State deprive any person of life, liberty, or property without due process of law. . . ."

STATEMENT OF THE CASE

This action was instituted pursuant to 42 U.S.C. §1983 in the United States District Court for the Eastern District of Kentucky by Ewell Scott and Calvin Bell[1] as a class action on behalf of all inmates incarcerated in the Kentucky penal system who are subject to the jurisdiction of the Kentucky Parole Board.[2] The action challenged the constitutionality of the absence of minimal procedural safeguards in parole release proceedings conducted by the Kentucky Parole Board (hereinafter referred to as the Board), which has the authority, pursuant to Ky. Rev. Stat. §§439.330 and 439.340, to release on parole all eligible inmates in the Kentucky penal system. The Complaint (a copy of which is set out in the attached Appendix on p. 7A), seeking declaratory and injunctive relief, was tendered along with a motion for leave to proceed in forma pauperis and properly authenticated affidavits.

The Complaint (App. pp. 7A) alleged a number of constitutional deficiencies in the practices and procedures employed by the Board in the conduct of parole release proceedings. The most prominent of these included:

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[1] Since this action was filed, the plaintiff Bell has been released from custody. Plaintiff Scott is still incarcerated.

[2] A small number of inmates are permanently ineligible for parole pursuant to Ky. Rev. Stat. §435.090 and are not included in the class on behalf of whom this action was brought.

(1) The parole applicant is denied access to any of the material considered by the Board in reaching its decision.

(2) At the parole hearing -- which often lasts only minutes -- the applicant is not afforded a meaningful opportunity to present evidence in his behalf.

(3) At no time throughout the proceedings is an applicant permitted to be represented by counsel or by a lay representative or advocate.

(4) The unsuccessful applicant neither is provided a written statement of reasons explaining the basis for denial nor is informed of the criteria, if any, used by the Board in reaching its decision or of the conditions or requirements which, if fulfilled, would allow the applicant to be favorably considered by the Board.

The Complaint also set forth the particular circumstances surrounding the last interviews afforded the named plaintiffs by the Board. Petitioner Scott was last given a hearing by the Board in November, 1973. Consideration of his parole was governed by the practices and procedures described above. Most of the discussion at the interview concerned the facts surrounding his conviction. Despite a near perfect institutional record, the Board, after brief deliberation, informed Scott that he needed "more time to get together" and gave him a twenty-four month setback.

In a memorandum opinion dated March 15, 1974, the District Court -- without the benefit of any responsive pleadings by the defendants -- overruled the plaintiffs' motion for leave to proceed in forma pauperis and dismissed the action. The opinion, citing earlier federal cases that had rejected similar challenges, concluded that the denial of parole "wreaks no such 'grevious loss'" as to activate the minimum procedural safeguards of the Fourteenth Amendment. The plaintiffs duly filed a motion for leave to appeal in forma

pauperis, but this Motion was denied by the District Court on the ground that the appeal was not taken in good faith.

Thereafter, the plaintiffs requested leave to appeal in forma pauperis from the United States Court of Appeals for the Sixth Circuit, and this motion was granted on July 25, 1974. Following full briefing and argument, the Sixth Circuit, on January 15, 1975, affirmed the judgment of the District Court. In its opinion, the Sixth Circuit, after reviewing the applicable facts, concluded that "the complaint alleged no violation of rights guaranteed to the plaintiffs under the United States Constitution." The plaintiffs filed a petition for rehearing and suggestion of the appropriateness of a rehearing in banc, citing very recent decisions by the United States Court of Appeals for the District of Columbia and the United States Court of Appeals for the Fourth Circuit ruling that the minimum procedural safeguards of the due process clause of the Fifth and Fourteenth Amendments do apply in parole release proceedings. On April 2, 1975, the Sixth Circuit denied the petition without comment. This petition seeks to review the rejection by the Sixth Circuit of the applicability of the due process clause of the Fourteenth Amendment to state parole release proceedings.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW IS SQUARELY IN CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEAL ON AN IMPORTANT QUESTION AFFECTING THE ADMINISTRATION OF CORRECTIONAL JUSTICE NATIONWIDE.

Every state now has some system for the early release of inmates through parole. Although the details may differ, the process is generally the same as that employed by the Kentucky Board in the present case. The process is closed,

few formal procedures, if any, govern the proceedings, and the discretion of the parole board throughout the entire process is virtually unlimited. In many cases, as here, the parole applicant is left in the dark as to the reasons for denial and what standards or criteria, if any, the parole board used in making its decision, a penultimate one for the inmate. See generally Kastenmeier & Eglit, Parole Release Decisionmaking: Rehabilitation, Expertise, and the Demise of Mythology, 22 Am. U.L. Rev. 477 (1973).

Prior to Morrissey v. Brewer, 408 U.S. 471 (1972), courts were reluctant to interfere in parole proceedings, terming parole a privilege not entitled to constitutional protection. The decision in Morrissey, which demolished the right-privilege distinction in defining a parolee's constitutional rights, dramatically altered the hands-off posture assumed by the federal judiciary and led to a wave of decisions on the precise issues raised in the case at bar. At first, the cases on this issue were split. For cases requiring minimum due process protection in parole release proceedings, both federal and state, see Cooley v. Sigler, 381 F. Supp. 441 (D. Minn. 1974); Craft v. Attorney General of the United States, 379 F. Supp. 539 (M.D. Pa. 1974); Candarini v. Attorney General of the United States, 369 F. Supp. 1132 (E.D. N.Y. 1974); Johnson v. Heggie, 362 F. Supp. 851 (D. Colo. 1973); Solari v. Vincent, 77 Misc. 2d 357, 353 N.Y.S. 2d 639 (1974); In re Sturm, 11 Cal. 3d 258, 521 P.2d 97 (1974); Monks v. Board of Parole, 277 A.2d 193 (N.J. 1971). For cases rejecting all claims of due process rights in parole release proceedings, both federal and state, see Wiley v. United States Board of Parole, 380 F. Supp. 1194 (M.D. Pa. 1974); Rankins v. Christian, 376 F. Supp. 1258 (D.V.I. 1974); Ornitz v. Robuck, 366 F. Supp. 183 (E.D. Ky. 1973); Baradale v. United States Board of Paroles and Pardons, 362 F. Supp. 338 (M.D. Pa. 1973); Harrison v. Robuck, 508

S.W.2d 767 (Ky. 1974).

But, in the few years it took for these cases to make their way up the appellate ladder, the weight of authority decidely turned in favor of extending due process protection to parole release proceedings. Three recent cases, reaching results diametrically opposed to the Sixth Circuit in the present case, illustrate the better reasoned decisions on this issue.

In United States ex rel. Johnson v. Chairman of New York Board of Parole, 500 F.2d 925 (2d Cir.), vacated on mootness grounds sub nom. Regan v. Johnson, 95 S. Ct. 488 (1974), the Second Circuit, facing the same issue as presented in this petition, held that the due process clause of the Fourteenth Amendment requires the New York State Board of Parole to provide inmates of state prison facilities with a written statement of reasons when release on parole is denied. At the threshhold, the court distinguished the prior Second Circuit case of Menechino v. Oswald, 430 F.2d 403 (2d. Cir. 1970),[3] on two grounds: (1) In Menechino, the plaintiff had primarily sought the right to counsel and to cross-examine witnesses -- rather than the right to a written statement of reasons. No consideration therefore was given to partial relief; and (2) Menechino was decided prior to Morrissey v. Brewer, supra, which "rejected the concept that due process might be denied in parole proceedings on the ground that parole was a 'privilege' rather than a 'right.'" 500 F.2d at 927.

With parole treated as an "interest" entitled to due process protection, the Court found that:

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[3] Menechino was one of the cases heavily relied on by the District Court here.

> "[a] prisoner's interest in prospective parole, or 'conditional entitlement', must be treated in like fashion. To hold otherwise would be to create a distinction too gossamer-thin to stand close analysis. Whether the immediate issue be release or revocation, the stakes are the same: conditional release versus incarceration". Id. at 928.

Strengthening the Court's view was the fact that in New York, as in Kentucky, most inmates could expect parole. Therefore, "[f]or him, with such a large stake, the Board's determination represents one of the most critical decisions that can affect his life and liberty". Id.

Having decided that due process applies to parole release proceeding, the Court turned to the question of what process is due. It held that an inmate who had been denied parole must be given a statement of reasons for the denial that would be sufficient to enable a reviewing body to determine whether parole had been denied for an impermissible reason or for no reason at all and that would inform the inmate both of the grounds for the decision and the essential facts upon which the parole board's inferences were made. A reasons requirement, the court observed, would not only promote rehabilitation by letting the inmate know where he stood, but also enhance the integrity of the decision-making process of the parole board.

In Bradford v. Weinstein, No. 73-1751 (4th Cir. Nov. 22, 1974), rev'g 357 F. Supp. 1227 (E.D. N.C. 1973), the Fourth Circuit reached the same conclusion as the Second on the question of the applicability of due process protections to parole release proceedings:

> "We are of the view that plaintiffs' right to consideration for parole eligibility is, at least, an aspect of liberty to which the protection of the due process clause extends. Indeed, in North Carolina, which guarantees to each prisoner with respect to parole 'a review and consideration of its case on the merits', the right may be one of 'property'." Slip Opin. at 9.

Calling the parole release situation the converse of the in-prison disciplinary situation in Wolff v. McDonnell, 418 U.S. 539 (1974), the court discerned no distinction in the two circumstances as far as the applicability of due process protection was concerned. "We think it would be a grievous loss for a prisoner by reason of a completely ex parte proceeding, and the resulting increased opportunity for committing error, to be denied parole and required to serve more of his term because the attention of the parole board was not called to data tending to indicate that parole should be granted, or for a prisoner whose incarceration has as its ultimate objective the prisoner's rehabilitation to fail to know, let alone understand, why parole is denied him and learn what changes in attitudes, habits, and the like will be required if he is ever to be successful in obtaining parole...." Slip Opin. at 11. Having reached the conclusion that the Sixth Circuit here rejected, the court remanded the case for further development of how much process is due.

In Childs v. United States Board of Parole, No. 74-1276 (D.C. Cir. Dec. 19, 1974), aff'g 371 F. Supp. 1246 (D.D.C. 1973), the United States Court of Appeals for the District of Columbia joined with the Second and Fourth Circuits in holding that "the parole decision must be guided by minimal standards of procedural due process". Slip Opin. at 16. Relying on Morrisey, Wolff, and the trend of recent decisions on this issue and distinguishing the only full-blown post-Morrissey adverse Court of Appeals decision on this question, Scarpa v. United States Board of Parole, 477 F.2d 278 (5th Cir.), vacated on mootness grounds 414 U.S. 809 (1973).[4]

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[4] In a recent suit on this issue, the Fifth Circuit accorded no precedential value to Scarpa. Ridley v. McCall, 496 F.2d 213 (5th Cir. 1974). See also Cook v. Whiteside, 505 F.2d 32 (5th Cir. 1974).

the Court ruled that the protection of an individual's interest in liberty from possible arbitrary governmental deprivation demanded that due process apply to parole release proceedings. With this basic ruling behind it, the Court proceeded to examine the minimal procedures that must infuse the parole release process.

Flying in the face of these decisions and others,[5] the Sixth Circuit by its decision below, has refused to bring the rule of law into state parole release proceedings. As a result of this decision, the Kentucky Parole Board remains free to exercise the unbridled discretion it has enjoyed in the past with no insurance for the inmate against arbitrary and mistaken decisions. The decision is directly contrary to the rulings of other Circuit Courts of Appeal and, as a matter of pressing importance in the orderly administration of correctional justice nationwide, should be reviewed by this Court.

II.

THE DECISION BELOW CLEARLY RUNS COUNTER TO THE TREND OF RECENT CASES OF THIS COURT EXTENDING DUE PROCESS PROTECTIONS.

In affirming the decision of the District Court, the Sixth Circuit put itself on record as approving the proposition that the denial of parole does not "wreak a grievous loss of liberty" sufficient to bring into play the Fourteenth Amendment's guarantee of procedural due process. In so holding,

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[5] See Mower v. Britton, 504 F.2d 396 (10th Cir. 1974); King v. United States, 492 F.2d 1237 (7th Cir. 1974).

it sided with the reasoning of a handful of lower federal court cases, most of which antedated Morrissey v. Brewer, 408 U.S. 471 (1972). In light of Morrissey and subsequent cases, the support for the Sixth Circuit's position is gravely eroded, if not nonexistent.

In Morrissey, this Court recognized that release on parole is not a "privilege" subject to revocation at the will of the state, but, to the contrary, an important interest deserving constitutional protection:

> "During the past 60 years, the practice of releasing prisoners on parole before the end of their sentences has become an integral part of the penological system. Note, Parole Revocation in the Federal System, 56 Geo. L.J. 705 (1968). Rather than being an ad hoc exercise of clemency, parole is an established variation on imprisonment of convicted criminals. Its purpose is to help individuals reintegrate into society as constructive individuals as soon as they are able, without being confined for the full term of the sentence imposed. It also serves to alleviate the costs to society of keeping an individual in prison.
>
> ....
>
> We turn, therefore, to the question whether the requirements of due process in general apply to parole revocations. As MR. JUSTICE BLACKMUN has written recently, 'this Court now has rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a "right" or as a "privilege"'. Graham v. Richardson, 403 U.S. 365, 374 (1971). Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.' Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), quoted in Goldberg v. Kelley, 397 U.S. 254, 263 (1970). The question is not merely the 'weight' of the individual's interest, but whether the nature of the interest is one within the contemplation of the 'liberty or property' language of the Fourteenth Amendment. Fuentes v. Shevin, 407 U.S. 67 (1972)." Id. at 477, 481.

In recognizing the real value of this interest to the parolee, the Court put parole on a higher plane for constitutional purposes than lower courts had uniformly viewed it in the past and "it is fair to say that the slate has been wiped all but clean." Childs v. United States Board of Parole, 371 F. Supp. 1246, 1247 (D.D.C. 1973).

In the recent decisions of the District of Columbia, Second and Fourth Circuits discussed above, the reasoning in Morrissey played a major role in the courts' rulings. In Childs v. United States Board of Parole, supra, the D.C. Circuit used Morrissey as the fundamental framework for its decision. Asserting that an aggrieved parole "applicant is deprived of the valuable features of conditional liberty described by the Court" in Morrissey and recognizing that "[t]he Board holds the key to the lock of the prison," Slip Opin. at 15, the Court, taking the logical step dictated by Morrissey, extended the protection of the due process clause to the administration of parole release. In United States ex rel. Johnson v. Chairman of New York Board of Parole, supra, Morrissey also served as the foundation of the Second Circuit's decision. "In our view Morrissey not only cast grave doubt upon [prior Courts of Appeals decisions on this issue] but, more important for present purposes, rejected the concept that due process might be denied in parole proceedings on the ground that parole was a 'privilege' rather than a 'right'." Id. at 927. Likewise, in Bradford v. Weinstein, the Fourth Circuit hinged its reasoning on the pivotal holding in Morrissey.

In addition to Morrissey, both Childs and Bradford looked to the recent decision of this Court in Wolff v. McDonnell, supra, extending due process protection to in-prison disciplinary proceedings, as support for their holdings. In Childs, the court noted:

> "Just as the Court found in Wolff that the State, having created the valuable right to good time, must act according to constitutional safeguards when it withdraws the right, so here, where the Federal government had made parole an integral part of the penological system, I believe it is also essential that authority to deny parole not be arbitrarily exercised. While the applicant's status is not changed by such a denial in the sense that he remains in the same custodial situation as before, the necessity of due process to support the denial is not therefore obviated, for the status remains the same because of a Board determination which if favorable would have changed the status to one of greater liberty." Slip Opin. at 20.

In Bradford, the Fourth Circuit also viewed its result as logically flowing from the holding in Wolff:

> "The case is really the converse of Wolff. There, one who was confined is afforded the right of consideration of partial release from restraint and the privilege of partial release. The first is a right not to be restrained; the second, the privilege of release from restraint. The distinction is without a difference, because the historical dichotomy of protection, depending upon whether something is a right or privilege has now been eradicated." Slip Opin. at 10. Accord, Craft v. Attorney General of United States, 379 F. Supp. 538 (M.D. Pa. 1974).

By finding no constitutional deprivation in the instant case, the Sixth Circuit markedly departed from the principles enunciated in Morrissey and Wolff.[7] This Court should grant certiorari if only to erase any misimpression the decision below leaves with regard to the proper scope of these decisions.

Not only does the decision below improperly limit the

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[7] Buttressed by Morrissey, a line of cases has developed requiring due process in the parole recission situation, where a parole board rescinds a previously granted release date based on new adverse evidence. In principle, these cases are indistinguishable from the theory urged by the petitioners in the case at bar. See In re Prewitt, 8 Cal. 3d 470, 503 P.2d 1326, 105 Cal. Rptr. 318 (1972); Hamm v. Regan, 43 App. Div. 2d 344, 351 N.Y.S. 2d 742 (1974); King v. Genekas, 3 Pris. L. Rptr. 119 (Mass. Super. Ct. Feb. 26, 1974); Means v. Wainwright, 229 So.2d 577 (Fla. 1974), cert. denied 95 S. Ct. 796 (1975); but see Sexton v. Wise, 494 F.2d 1176 (5th Cir. 1974).

scope of Morrissey and Wolff, but it also runs counter to the distinct recent trend of other decisions of this Court extending due process protections. Since Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) (due process before garnishment of wages), this Court, in an almost unbroken line of cases, has extended the safeguards of the due process clause to a host of situations where liberty and property interests formerly exempt from constitutional protection were threatened by unchecked governmental action. See, e.g., Gagnon v. Scarpelli, 411 U.S. 778 (1973) (due process may require counsel in probation revocation hearing); Fuentes v. Shevin, 407 U.S. 67 (1972) (due process before state-assisted repossession); Bell v. Burson, 402 U.S. 535 (1971) (due process before suspension of driver's license); Wisconsin v. Constantineau, 400 U.S. 433 (1971) (due process before publicly advertised right to purchase liquor); Goldberg v. Kelly, 397 U.S. 254 (1969) (due process before termination of welfare benefits). Most recently, in Goss v. Lopez, 95 S. Ct. 729 (1975),[8] the Court brought public school suspensions under the protective canopy of the due process clause. In analyzing the entitlement to a public education asserted by the students, the Court found that both property and liberty interests were at stake in suspensions from school. The property interest was grounded in the state's extension of the right to an education to all children, whereas the liberty interest was rooted in the damaging consequences potentially flowing from even a ten-day suspension. Having established the existence of these separate interests, the Court concluded:

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[8] See also North Georgia Finishing, Inc. v. Di-Chem, Inc., 95 S. Ct. 719 (1975).

"Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary." Id. at 737.

The analysis employed in Goss, which was distilled from a number of prior cases interpreting the applicability of the due process clause, is directly relevant to the present case. By statute, Kentucky has established the right to parole consideration, an undeniably significant event in the life of a prisoner. Similarly, the denial of parole is a direct impingement on a prisoner's liberty, depriving him of conditional release, and may entail other adverse collateral consequences. With both property and liberty interests at stake -- interests that can be viewed as of much greater moment than those involved in a ten day school suspension -- the denial of parole should, a fortiori, qualify for due process protection.

Bucking the well settled principles articulated in Goss and prior cases, the decision below immunizes an important state agency from the salutary procedures dictated by the due process clause. Protected from review or scrutiny of any kind, the Kentucky Parole Board -- unlike the prison administrators in Wolff, the school personnel in Goss, or the transportation officials in Bell, among others - is left free to decide the fate of prisoners without any of the minimal protection required by due process. This result contradicts the letter and spirit of the overwhelming number of decisions of this Court extending due process protection and should be reviewed for this reason alone.

III.

CONCLUSION

For the reasons stated above, a writ of certiorari should be granted to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDICES

FILED

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT JAN 15 1975

JOHN P. HEHMAN, Clerk

CALVIN BELL and EWELL SCOTT,

Plaintiffs-Appellants

V.

O R D E R

KENTUCKY PAROLE BOARD, LUCILLE ROBUCK, Chairman of the Kentucky Parole Board, CHARLES WILLIAMSON, NEWT McCRAVEY, CARL OWSLEY and GLEN WADE, Members of the Kentucky Parole Board,

Defendants-Appellees

Before: CELEBREZZE, MILLER and ENGEL, Circuit Judges

Plaintiffs Calvin Bell and Ewell Scott, both incarcerated in the Kentucky State Penitentiary and both having been denied parole release following hearings before the Kentucky Parole Board, filed this class action in the United States District Court for the Eastern District of Kentucky, seeking a determination that parole release procedures of the Kentucky Parole Board failed to conform to minimum guarantees under the due process clause of the Fourteenth Amendment to the United States Constitution. Their complaint sought as well the promulgation of detailed regulations to govern parole release hearings which would comport with their views of due process requirements. From a dismissal of their complaint by the district court, the plaintiffs appeal.

The case was submitted to this court upon the record and the briefs and oral arguments of counsel. Upon consideration thereof, it appearing that the complaint alleged no violation of rights guaranteed to the plaintiffs under the United States Constitution and that therefore the district court did not err in dismissing the complaint,

IT IS ORDERED that the judgment of the district court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

John P. Hehman

Clerk

FILED
MARCH 15, 1974

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
FRANKFORT

CALVIN BELL, EWELL SCOTT,
Individually and on behalf
of all other persons similarly
situated — PLAINTIFFS

v.

KENTUCKY PAROLE BOARD, ET AL — DEFENDANTS

MEMORANDUM

The plaintiffs seek to proceed in forma pauperis in this civil rights class action attacking procedural denials attendant to the operation of the Kentucky conditional release system. The tendered complaint alleges that the parole board utilizes unarticulated standards in defiance of state law, K.R.S. 439.340, and that the release hearings improperly deny (1) an adjudicatory proceeding; (2) representation by an attorney or lay counsel; (3) access to personal files in the possession of the board; (4) advance notification of the issues to be considered; (5) an opportunity to present evidence and cross-examine witnesses; (6) a transcript or summary of evidence; (7) findings of fact or statement of reasons for denial of parole. Analysis of these assertions reveals no deprivation cognizable by the federal courts.

The procedural dictates of the Due Process Clause are activated only upon the deprivation of a right or entitlement of constitutional magnitude. Although the loss of freedom resulting from revocation of parole merits due process applicability, Gagnon v. Scarpelli, 411 U.S. 778 (1973); Morrissey v. Brewer, 408 U.S. 471 (1972), the denial of parole wreaks no such "grievous loss". Goldberg v. Kelly, 397 U.S. 254, 263 (1970).

> "(A) parole revocation proceeding differs from a review by a parole board to determine whether an inmate should be paroled initially. In the former proceeding, the determination is whether the conditional freedom of the parolee should be terminated because of an alleged violation of the conditions of his parole. In a review to decide whether parole should be granted, the determination is whether an inmate is a suitable prospect for return to society.
>
> This Court is of the opinion that the Due Process Clause does not apply in procedures designed to determine suitability for parole."[1]

While courts will on occasion intervene to correct abuses in the nation's parole system, Morrissey v. Brewer, supra, the nature of this "practical and troublesome area"[2] demands that

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[1] Bradford v. Weinstein., E.D. N.C., 357 F. Supp. 1127, 1131 (1973). Accord, Ganz v. Bensinger, 7th Cir., 480 F.2d 88 (1973); Menechino v. Oswald, 2d Cir., 430 F.2d 403 (1970), cert. denied 400 U.S. 1023 (1971); Barradale v. United States Board of Paroles and Pardons, M.D. Pa., 362 F. Supp. 338 (1973); Ott v. Ciccone, W.D. Mo., 326 F. Supp. 609 (1970).

[2] McGinnis v. Royster, 410 U.S. 263, 270 (1973).

the states be left free to develop correctional remedies unhampered by pervasive judicial interference in the mechanics of conditional release; the numerous factors involved in the assessment of an inmate's suitability for release demands a flexibility unattainable in a formal adjudicatory hearing. "The Authority. . . is and must be free to weigh all the tangible and intangible factors which determine whether a particular person is ready to return to society before his maximum term has been served."[3] This consideration has led to judicial approval of parole hearings conducted without providing legal representation[4]; a transcript or summary of evidence[5]; access to prison files[6]; notice of issues[7]; the opportunity to present evidence and cross-examine adverse witnesses[8]; and reasons for denial of parole.[9] Similarly, the failure to promulgate standards, while conceivably in derogation of state law, is not a concern redressable in this forum; "(i)f the rule were otherwise, every erroneous decision on state law matters would come before the federal court as a constitutional question."[10]

An order will be entered overruling the motion for leave to proceed in forma pauperis and dismissing the action.

March 15, 1974 Mac Swinford, Judge

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3 Dorado v. Kerr, 9th Cir., 454 F.2d 892, 897 (1972), cert. denied 409 U.S. 934 (1972); Barradale v. United States Board of Paroles and Pardons, supra note 1; Ott v. Ciccone, supra note 1.

4 Ganz v. Bensinger, supra note 1; Dorado v. Kerr, supra note 2; Barnes v. United States, 8th Cir., 445 F.2d 260 (1971); Buchanan v. Clark, 5th Cir., 446 F.2d 1379 (1971), cert. denied 404 U.S. 979 (1971); Menechino v. Oswald, supra note 1; Schawartzberg v. United States Board of Parole, 10th Cir., 339 F.2d 297 (1968).

5 Dorado v. Kerr, supra note 2; Menechino v. Oswald, supra note 1.

6 Dorado v. Kerr, supra note 2; Bradford v. Weinstein, supra note 1.

7 Menechino v. Oswald, supra note 1; Barradale v. United States Board of Paroles and Pardons, supra note 1; Ott v. Ciccono, supra note 1.

8 Tarlton v. Clark, 5th Cir., 441 F.2d 384 (1971), cert. denied 403 U.S. 934 (1971); Menechino v. Oswald, supra note 1.

9 Dorado v. Kerr, supra note 2; Mosley v. Ashby, 3d Cir., 459 F.2d 477 (1972); Menechino v. Oswald, supra note 1.

10 Sims v. Parke Davis & Co., E.D. Mich., 334 F. Supp 774, 793 (1971), aff'd 6th Cir., 453 F.2d 1259 (1971), cert. denied 405 U.S. 978 (1972); Mosley v. Ashby, supra note 8; United States ex rel Campbell v. Pate, 7th Cir., 401 F.2d 55 (1968); Draper v. Rhay, 9th Cir., 315 F.2d 193 (1963); cert. denied 375 U.S. 915 (1963).

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT FRANKFORT

CALVIN BELL and EWELL SCOTT, Individually and on behalf of all other persons similarly situated,
PLAINTIFFS,

vs. Civil Action No._____

KENTUCKY PAROLE BOARD, LUCILLE ROBUCK, Chairman of the Kentucky Parole Board, CHARLES WILLIAMSON, NEWT MC CRAVEY, CARL OWSLEY, and GLEN WADE, Members of the Kentucky Parole Board,
DEFENDANTS.

COMPLAINT

The plaintiffs, for their complaint, allege as follows:

1. The jurisdiction of this Court arises under Title 28 U.S.C, §§1343(3)(4), 2201, 2202. This is a proceeding in equity pursuant to 42 U.S.C. §1983 to redress the violation of rights guaranteed to the plaintiffs by the Constitution of the United States, in particular the due process clause of the Fourteenth Amendment thereto.

2. Plaintiff CALVIN BELL is a citizen of the United States and the Commonwealth of Kentucky, presently incarcerated in the Kentucky State Penitentiary under a sentence of life imprisonment. Plaintiff EWELL SCOTT is a citizen of the United States and the Commonwealth of Kentucky, presently incarcerated in the Kentucky State Penitentiary under a sentence of twelve years

imprisonment.

3. Pursuant to FRCP 23, plaintiffs sue on behalf of themselves and on behalf of all persons similarly situated, to-wit, inmates incarcerated in prisons and other penal institutions in the state of Kentucky who presently or in the future will be subject to the jurisdiction of the KENTUCKY PAROLE BOARD, and who have been, are presently, or in the future will be brought before the KENTUCKY PAROLE BOARD for a parole release proceeding. These persons constitute a class so numerous as to make it impracticable to bring them before this Court. There are common questions of law and of fact affecting the rights of such persons to due process of law, and common relief is sought. The claims of the plaintiffs are typical of the claims of the class. These defendants have acted and intend to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief with respect to the class as a whole. The plaintiffs will fairly and adequately represent the interests of the class.

4. Defendant KENTUCKY PAROLE BOARD is an independent agency of the state of Kentucky established pursuant to K.R.S. 439.320, and charged by law with the authority to release a prisoner on parole and to conduct hearings to determine whether parole should be granted. Defendant LUCILLE ROBUCK is the Chairman of the Kentucky Parole Board, and defendants CHARLES WILLIAMSON, NEWT MC CRAVEY, CARL OWSLEY and GLEN WADE are members of the Kentucky Parole Board.

5. Pursuant to the provisions of K.R.S. 439.330, 439.340, the Board has authority to release on parole all inmates confined

in Kentucky prisons or other penal institutions who are eligible for parole. The Board is directed to adopt rules and regulations with respect to the eligibility of inmates for parole, such regulations to be "in accordance with prevailing ideas of correction and reform." To the best of plaintiffs' knowledge and belief, no such rules and regulations have been promulgated by the Board. Alternatively, if such rules and regulations have been promulgated, plaintiffs and the class they represent, to-wit, inmates incarcerated in prisons and other penal institutions in the state of Kentucky, have not been informed of the existence of such rules and regulations and are not aware of their contents.

6. Pursuant to the provisions described above, the Board is directed to study the case histories of persons eligible for parole, to conduct hearings on the desirability of granting parole and to obtain all pertinent information regarding each inmate eligible for parole. An interview of the inmate before one or more of the Board members is also required. The Board is further directed to adopt rules and regulations for the conduct of parole hearings. To the best of plaintiffs' knowledge and belief, no such rules and regulations have been promulgated by the Board. Alternatively, if such rules and regulations have been promulgated, plaintiffs and the class they represent, to-wit, inmates incarcerated in prisons and other penal institutions in the state of Kentucky, have not been informed of the existence of such rules and are not aware of their contents.

7. The Board and its members gather virtually no information about the inmates themselves. In studying the case histories of inmates eligible for parole, they rely entirely upon information contained in the file on the inmate, which is maintained by the

prison or other penal institution in which the inmate is incarcerated or by the Kentucky Department of Corrections. They occasionally supplement this file with information that outside sources or third persons may choose to furnish them. There is no organized way in which information is excluded or included in the file, organized in the file, or tested for relevancy, accuracy, reliability, bias or prejudice. The information contained in the file is thus haphazardly gathered, arbitrary in the inclusion and exclusion of facts, and unscientific and irrational with respect to intelligent decision-making. The inmate has no access to his file, is not aware of its contents, has no knowledge of what material in the file is being considered by the Board in making its decision, and has no opportunity to rebut or explain adverse information in the file.

8. The inmate is notified in advance of the date of his interview with a member or members of the Parole Board. He is not notified of what issues or information the Board will be considering in making the decision on his parole. In the absence of such knowledge he does not have a meaningful opportunity to prepare a presentation for consideration by the Board. At the interview before the Board, the inmate is permitted to speak and ask questions, but is not permitted to present evidence and arguments to justify his release. He is not permitted to challenge, cross-examine, or interpret the evidence that will be used by the Board in its decision to grant or deny parole. He is not permitted to be represented by counsel or by lay spokesmen or advocate, or in any manner whatsoever when his parole is being considered by the Board.

9. No record, transcript, or summary of the testimony and questions at the interview is prepared and maintained. The Board announces its decision orally, often at the conclusion of the interview, and generally with only minimal deliberation. Occasionally, oral reasons for the decision are given, but frequently no reasons at all are given. Written reasons are never given by the Board, and there is no statement of the factual basis for the decision, or of the rules, standards or criteria used in making the decision.

10. At no time, either before or after the decision, is an inmate advised by the Board as to what rules, standards or criteria will be used by the Board in determining whether to grant or deny parole, nor is he advised as to how he must conform his conduct, or as to what is expected of him, so that he may receive parole at a future date.

11. Plaintiff BELL was last given an interview before the Board in March, 1973. Consideration of his parole took place under the conditions described in paragraphs 5 through 10 herein. At that time he was given an eighteen month setback and was informed orally that the prosecuting attorney of the county in which his offense was committed did not want him to be released on parole. His request to see a copy of the prosecutor's letter was denied by the Board. Presumably, he will have another interview before the Board in September, 1974.

13. Plaintiff SCOTT was last given an interview before the Board in November, 1973. Consideration of his parole took place under the conditions described in paragraphs 5 through 10 herein. Most of the discussion at the interview concerned the facts surrounding his conviction. While in prison, he had

enrolled in school and was participating in a group therapy program. He had not committed any disciplinary infraction. After very brief consideration by the Board, he was informed he should "have more time to get together" and was given a twenty-four month setback. Presumably, he will have another interview before the Board in November, 1975.

14. The practices and policies of the Kentucky Parole Board described herein deny to the plaintiffs and the class they represent due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States in that they have brought about the continued deprivation of liberty of the plaintiffs and the members of the class without those procedural safeguards necessary to insure a fair and accurate determination of whether or not to grant parole. These practices and policies are violative of due process of law for the following reasons among others:

1. There is no adjudicatory-type hearing on the determination of whether to grant or to deny parole;

2. There is no opportunity for the inmate to be represented by an attorney, lay spokesman or advocate or other representative of the inmate's choosing;

3. There is no opportunity for the inmate to have access to the file that is considered by the Board or to rebut or explain adverse information in said file;

4. The inmate is not notified in advance of what issues or information the Board will be considering, and he is thus unable to prepare a proper presentation for consideration by the Board;

5. The inmate is not permitted to present evidence and arguments to justify his release on parole, nor to challenge, cross-examine or interpret the evidence that will be used by the Board in its decision to grant or deny parole;

6. No record, transcript or summary of testimony and questions at the interview is prepared and

maintained;

7. The Board does not state in writing the reasons for its decisions, and does not make a statement of the factual basis for the decision, or of the rules, standards or criteria used in making the decision.

15. Due process of law is further denied to the plaintiffs and the members of the class by the fact that the criteria, standards, norms or rules actually used by the Board in determining whether to grant or deny parole are unpublished and unarticulated and are applied in a wholly subjective, arbitrary and capricious manner. As a result of the failure of the defendants to articulate what rules, standards or criteria will be applied in the decision to grant or deny parole, plaintiffs and the members of the class do not know how they may conform their conduct to approved standards so that they may receive parole at a future date.

16. As a result of the actions described herein, the plaintiffs and the members of the class have suffered and will continue to suffer serious, immediate and irreparable injury to their constitutional rights and will continue to be incarcerated and deprived of their liberty without due process of law. The plaintiffs and the members of the class have no plain, speedy and adequate remedy at law, and the present suit is the only means of securing the relief requested.

WHEREFORE, Plaintiffs respectfully pray for the following relief:

1. That this Court advance this case on its docket, grant a hearing at the earliest practicable date and cause this case to be in every way expedited.

2. That this Court issue an Order pursuant to FRCP 23(c)(1) authorizing this action to be maintained as a class action.

3. That this Court issue a declaratory judgment to the effect that the practices and policies followed by the defendants in parole release proceedings, as described herein, are violative of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

4. That a permanent injunction be issued against the defendants herein, their attorneys, agents, employees, servants, and successors in office, directing them to take the following action:

A. To promulgate rules for the conduct of parole release proceedings which shall provide for the following:

(1) an adjudicatory-type hearing on the determination of whether to grant or deny parole;

(2) The opportunity for the inmate to be represented at such hearing by an attorney, lay spokesman or advocate or other representative of the inmate's choosing;

(3) The opportunity for the inmate to have access to his file prior to the time that said file is considered by the Board and to rebut or explain adverse information in said file;

(4) Notification to the inmate in advance of the hearing as to what issues or information the Board will consider at the hearing;

(5) The opportunity for the inmate to present evidence and arguments to justify his release on parole and to challenge, cross-examine or interpret the evidence that will be used by the Board in making its decision to grant or deny parole;

(6) The preparation and maintenance of a transcript or summary of testimony

and questions at the hearing;

(7) A statement in writing of reasons for the Board's decision to grant or deny parole and a statement of the factual basis for the decision and of the rules, standards or criteria used in making the decision;

(8) Where parole is denied, a statement of what the inmate will be required to do in order to be eligible for parole in the future.

B. To promulgate and publish for distribution to the plaintiffs and members of the class the criteria, standards, norms or rules that will be used by the Board in determining whether to grant or deny parole.

5. That the plaintiffs be awarded any and all other relief to which they or the members of their class may appear to be entitle

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